



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Quality Support, Inc.--Reconsideration

File: B-254635.3

Date: March 17, 1994

Wayne M. Gatewood, Jr., for the protester.
John M. Melody, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Decision dismissing protest of alleged bad faith actions by agency while negotiating the terms of a section 8(a) contract is affirmed on reconsideration where protester fails to show that dismissal was factually or legally erroneous, or to present information not previously considered that supports a different conclusion.

DECISION

Quality Support, Inc. (QSI) requests reconsideration of our January 4, 1994, dismissal of its protest under National Endowment for the Arts (NEA) solicitation No. DC-93-02, a proposed sole-source award to QSI under the Small Business Administration's (SBA) section 8(a) program.

We affirm the dismissal.

QSI protested the manner in which NEA was negotiating the contract, maintaining that the agency was refusing to allow certain legitimate costs to be included in the contract price. QSI generally alleged that the agency was proceeding in bad faith and purposely was trying to "harm" QSI.

We dismissed QSI's protest on the basis that it essentially was a challenge to the terms of the contract. SBA is responsible for reviewing the contract before award to determine whether the terms are proper; our Office will review protests in this area only where there is "a showing of possible fraud or bad faith on the part of government officials, or that regulations may have been violated." 4 C.F.R. § 21.3(m)(4) (1993). While QSI alleged that the agency's position in negotiations was motivated by bad faith, there was no evidence presented that this was or may have been the case; the matter therefore was not for our review.

In its reconsideration request, QSI emphasizes its previous assertions that the agency purposely attempted to harm QSI, made inexplicable requests of QSI--for example, NEA asked for detailed cost information but then allegedly never analyzed it--and engaged in a pattern of procurement improprieties over a period of years. QSI maintains that it has in fact met our standard for showing possible fraud or bad faith on NEA's part, and that we therefore should review the matter.

We disagree. While the protester's submissions do indicate that its negotiations with NEA have been contentious, and that NEA, QSI, and SBA have been unable to agree on certain pricing matters, the mere existence of disagreement over contract terms does not evidence possible bad faith by the agency. Our view that such disagreement is the essence of the protest is reflected in QSI's complaint that, although at one point during the negotiations one NEA official represented that she had authority to negotiate, she appeared to refer to a report provided her by NEA management and to dictate the terms from that report, and then refused to negotiate further after QSI presented a counteroffer. QSI obviously expected and desired compromise by the agency during the negotiating process. However, the fact that an agency refuses to waiver from a position taken by the agency's management simply does not show bad faith.


QSI's protest also appears to be founded on its perception that NEA is "not interested in the 8(a) program or the success and growth of participating firms" such as QSI; rather, NEA believes "the only issue was that of the lowest possible cost for services." Even assuming that QSI's characterization of NEA's position is correct, there is no legal requirement under the 8(a) program that agencies compromise their needs--including obtaining services at the lowest possible price. Contrary to QSI's apparent understanding, agencies need not approach negotiations with 8(a) firms any differently from how they do with non-8(a) firms.

As for some of QSI's specific assertions: (1) there is absolutely no evidence that the agency intends to harm QSI--QSI merely concludes that this must be the agency's desire, since the agency apparently has taken positions in negotiations contrary to QSI's; (2) the fact that NEA requested cost information without (allegedly) performing a cost analysis does not reveal any improper motive by the agency, and thus cannot indicate bad faith; and (3) the alleged procurement improprieties QSI cites did not concern the current contract, and were never protested to our Office; moreover, the fact that an agency may have failed to comply with procurement regulations in the past does not constitute evidence of bad faith.

QSI also asserts that an NEA procurement official "threatened" QSI's president by stating that "Making me angry would not be in your best interest," and made demeaning remarks such as "Can't you hear straight?" While we do not view such remarks to be appropriate, absent something more--other than mere intractability in negotiations, as discussed above--suggesting that the agency officials are motivated by a desire to harm the firm rather than by the agency's interest in obtaining contract terms most favorable to it, remarks of this type do not by themselves show possible agency bad faith.

We conclude that QSI's dispute with NEA is essentially a disagreement with the agency over the terms of the contract, and that, while NEA may not be willing to accept terms that QSI believes rightfully should be included in the contract, there is no indication that the agency may be acting in bad faith. Our involvement in disputes of this nature would be equivalent to our arbitrating the 8(a) sole-source negotiations process, which, again, is not our function. Rather, it is the SBA that is expected to act on the 8(a) firm's behalf when such action is warranted. In this regard, SBA's regulations specifically provide that the Administrator of SBA may appeal certain matters--including "the terms and conditions of a particular contract" and the agency's fair market price estimate--to the head of the procuring agency. 13 C.F.R. §§ 124.321(b) and 124.315(c) (1993). Further, as pointed out in our prior decision, the final contract is subject to SBA approval. Federal Acquisition Regulation § 19.808-1. QSI's submissions indicate that SBA is in fact involved in this matter on QSI's behalf.

As QSI has not shown that our decision was based on errors of fact or law, or presented information not previously considered that supports a different conclusion, 4 C.F.R. § 21.12, our decision is affirmed.


 Ronald Berger
 Associate General Counsel